

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
)	
Implementation of Section 621(a)(1) of the)	
Cable Communications Policy Act of 1984 as)	MB Docket No. 05-311
amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

The Broadband Service Providers Association (“BSPA”) hereby submits these comments in response to the Commission’s Further Notice of Proposed Rulemaking released on March 5, 2007 in the captioned proceeding on franchise reform.¹ Among other things, the *Further Notice* asks for comment as to whether the measures adopted in the *Franchising Order* governing the award of new competitive franchises should be applied to cable operators that have existing franchises as they negotiate renewal of those agreements with Local Franchising Authorities (“LFAs”).²

INTRODUCTION AND BACKGROUND

BSPA represents competitive network operators that have had significant experience with existing cable franchising regulations.³ The BSPA was formed in 2002 to represent a new

¹ See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 06-180, MB Docket No. 05-311 (rel. March 5, 2007)(“*Franchising Order*” and “*Further Notice*,” respectively).

² *Id.* at ¶ 140.

³ The current members of BSPA, all of which are last-mile, facilities-based providers, are: Cinergy MetroNet, Everest Connections, Hiawatha Broadband, Knology, PrairieWave Communications, and RCN.

segment of the communications industry that emerged following passage of the Telecommunications Act of 1996.⁴ Broadband service providers (“BSPs”) deploy and operate new, facilities-based, advanced, last-mile broadband networks for the delivery of innovative bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country. BSP networks serve more than 1.2 million customers and have achieved significant market share where they operate. As is now well established, such wireline competition brings substantial competitive benefits to consumers not found in markets where direct broadcast satellite (DBS) is the exclusive multichannel video programming distribution (MVPD) alternative to incumbent cable operators.⁵ BSPs are successful, key examples of the type of additional wireline competition that is a primary objective of the new franchise rules adopted by the Commission.

BSPA members operate in competitive markets, facing wireline competition from incumbent operators, and in certain markets are, or will be competing with a second wireline competitor as incumbent local exchange carriers (“ILECs”) enter the market and take advantage

⁴ Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151 *et seq.* (“1996 Act”).

⁵ See *Franchising Order*, ¶ 50, & n.183 (reporting evidence in Keller, Texas where competitor rates are 13% below that of the incumbent, and in Pinellas County, Florida where incumbent faces competition from BSP Knology, and incumbent’s rates are \$10-\$15 lower than in neighboring areas where it faces no competition); *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15091 (2006) (finding that cable prices decrease substantially when a second wireline competitor enters the market -- approximately 15% or \$5 per month); see also Government Accountability Office (GAO), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) (finding that “entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services,” that “[i]ncumbent cable operators often responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service,” and that in all but one market studied, rates for expanded basic cable television services were 15 to 41 percent (an average of over 23 percent) lower in markets with a BSP, when compared with similar markets that did not have a wireline competitor). As an additional example, in Canton, SD, where BSPA member PrairieWave Communications is the wireline competitor, the incumbent cable company’s prices remain 15% lower than in Sioux Falls, a community 15 miles away, where there is no wireline competitor and PrairieWave has had problems with LFA overbuild requirements in entering the market.

of the rules adopted in the *Franchising Order*. BSPA believes that it is imperative that those rules be applied to all competitors, and believes that a reasonable way of doing so is to apply those rules in the context of competitive franchise renewals, particular given the experience of its members in the context of franchise renewal negotiations. In that way, over time, no one entrant will be competitively advantaged as a result of the Commission's new franchising rules, and LFAs will be prevented from using the renewal process to extract improper concessions and add-ons, as was routinely the case when competitive franchises were initially negotiated.

DISCUSSION

A. Any Changes to the Franchising Process Must Apply Equally to all Current Competitive Operators.

It is imperative that existing competitive video franchises are made subject to the same rules the Commission has adopted with respect to the franchising process applicable to new entrants. BSPA believes that an appropriate and reasonable way to implement this policy is to apply the new franchising rules to the renewal of competitive franchises.

The primary goal of franchise reform has been to remove a barrier to the further development of wireline competition. During the past 10 years, BSPs have negotiated hundreds of competitive cable franchises in multiple markets. Consistent with the recent experience of ILECs and others that are seeking new franchises to provide MVPD services,⁶ BSP competitive franchises negotiated over the last ten years typically include significant add-ons and financial requirements that would be unlawful and preempted under the new franchising rules, had those rules been in effect during negotiation of these franchises.⁷ The franchising process experienced

⁶ See *Franchising Order*, ¶ 31 (build-out requirements), ¶ 43 (demands unrelated to video service), ¶ 44 (excessive franchise fees), ¶ 46 (PEG and I-Net Requirements); ¶ 47 (level-playing field provisions).

⁷ *Id.*, ¶ 126 (preempting local laws, regulations, practices, and requirement that conflict with the rules and guidance adopted in the *Franchising Order*).

by the BSPA members was long, expensive and laborious, resulting in build-out requirements, costly add-ons and “perks” unrelated to video services, excessive franchise fees, unreasonable PEG and I-Net requirements, and level-playing field provisions, all of which would now be prohibited under the rules and guidance adopted in the *Franchising Order*.

Legacy competitive franchises must be dealt with to properly adhere to the mandates and policy considerations of the 1996 Act. These existing competitive franchisees should not be penalized because they were the first to risk market entry and competition with incumbent cable operators. Significantly, if a new LEC or other wireline competitor does not have the same franchise-related local costs and requirements to provide service due to application of the *Franchising Order*, the higher costs faced by the original competitive BSP could result in a form of stranded investment of the very companies whose entry exemplifies the goals of the 1996 Act.

Given this, the Commission should adopt its tentative conclusion in the *Further Notice*, and apply those rules to the renewal of existing competitive franchises, i.e., in those markets where there are two or more wireline franchisees. Many franchises in such competitive markets are now coming up for renewal, and BSPs experience has been that LFAs are using the renewal process to continue the imposition of the requirements the Commission found unlawful in the *Franchising Order*, as well as using the renewal process as an opportunity to extract new requirements that would likewise be unlawful under the Commission’s franchising rules.⁸

BSPA agrees with the Commission’s tentative conclusion in the *Further Notice* that the Commission’s findings in the *Franchising Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. The

⁸ For a detailed discussion of the specific demands made by a number of LFAs during the renewal process experienced by one BSPA member and the resulting delay and uncertainty associated with the renewal process, see the Comments of Knology, Inc. filed in the instant proceeding contemporaneously herewith.

Commission should make clear that LFAs may not use the renewal process to perpetuate existing requirements that are unlawful under the Commission's new rules, or to impose new such requirements. In particular, the Commission should apply the rules and guidelines in the *Franchising Order* to the renewal process by adopting the following provisions pursuant to Section 626 of the Communications Act of 1934, as amended ("Communications Act"),⁹ which governs renewals:

(1) The Commission should make clear that (a) an LFA may not deny a proposal for the renewal of franchise submitted under Section 626 based on the refusal of a cable operator to include provisions in the proposal that are unlawful under the rules and guidance adopted in the *Franchising Order*, or condition approval of the renewal proposal on the inclusion of such prohibited provisions, and (b) likewise make clear that any such provisions to the extent included, are preempted.

(2) The Commission should require that any needs assessment proceeding and performance review commenced under Section 626(a)(1) will be deemed concluded if not completed within 90 days of commencement.¹⁰

(3) Consistent with the 90 day time for decision adopted in the *Franchising Order*, the Commission should also require that a decision granting or denying a renewal, whether

⁹ 47 U.S.C. § 546.

¹⁰ This then triggers the ability of a cable operator to submit a renewal proposal under Section 626(b)(1), as well as triggering the additional renewal procedures contained in Section 626(c) through (g). Section 626 provides two different renewal tracks. Under one track (*see generally* Section 626(a) through (g)), the LFA initiates a needs assessment and performance review, whether on its own initiative or following a renewal notice filed by the cable operator. Upon completion of that proceeding, the cable operator may then file a renewal proposal, on which the LFA has 4 months to act. At the end of the 4-month period, the LFA may either grant the renewal, or make a preliminary assessment that the franchise should not be renewed, and commence an administrative proceeding to consider whether the renewal proposal should be granted or denied, based on four factors enumerated in the provision. Section 626 does not specify a time limit for completion of the administrative proceeding and issuance of a decision on the renewal proposal. If the procedures in Section 626(a) through (g) are not followed, a cable operator may nonetheless submit a renewal proposal at any time, but no time limit is specified for the LFAs decision. *See* Section 626(h).

following completion of an administrative proceeding commenced under Section 626(c)(1), or submission of a proposal under Section 626(h) outside the procedures of Section 626(a) through (g), be made within 90 days following commencement of the administrative proceeding under Section 626(c)(1) or submission of the renewal proposal under Section 626(h), as the case may be. As with initial franchises, if an LFA has not reached a final decision within the 90-day timeframe, the LFA should be deemed to have granted an interim renewal based on the terms contained in the renewal proposal.¹¹

Finally, the Commission asks for comment in the *Further Notice* on what effect, if any, the findings in the *Franchising Order* have on most favored nations clauses that may be included in existing franchises.¹² Consistent with Section 626(h), which allows a cable operator “to submit a proposal for the renewal of a franchise pursuant to this subsection at any time,” BSPA believes that if one cable operator in competitive market, either as a new entrant or through the renewal process, is able to eliminate provisions included in a prior franchise that were deemed unlawful under the *Franchising Order*, then a second operator that is subject to similar requirements in its franchise, may submit a proposal for renewal under Section 626(h) that would likewise conform its franchise to the requirements of the Commission’s rules.

BSPA believes that existing competitor and incumbent franchises in competitive markets should receive equal regulatory treatment that is consistent with other markets that are experiencing the introduction of wireline competition through new franchises. These parties should not be penalized for the fact that they are already in competitive markets and they may or may not see the introduction of a third competitor through the new franchising rules. The new

¹¹ See *Franchising Order*, ¶ 67.

¹² *Franchising Order*, ¶ 140.

standardized franchising system adopted by the Commission must recognize and address the inequities that would result if new competitive franchises are governed by the new system while existing competitive franchises remain subject to provisions historically mandated by LFAs that the Commission has determined are impermissible.

B. The Commission Has Ample Authority to Apply its Franchising Rules to Renewal Negotiations.

In the *Further Notice*, the Commission also asks for comment on its authority to apply the findings in its *Franchising Order* to renewal negotiations between cable operators and LFAs. Essentially, the same legal authority that provided the basis for the Commission to adopt the *Franchising Order*, likewise provides authority for the Commission to apply those rules in the context of renewals.

First, in the case of a competitive franchisee, the unreasonable refusal to grant a renewal under Section 626 on the basis of required conditions that are unlawful under the *Franchising Order*, would result in the unreasonable refusal to award an additional competitive franchise under Section 621(a). Thus, the Commission's authority to adopt rules under Section 621(a) that formed the basis for the *Franchising Order*, likewise provides the Commission with authority to adopt the proposed rules here.

In addition, the rules proposed above are pursuant to and would implement Section 626. As the Commission recognized in the *Franchising Order*, Section 201(b) of the Communications Act,¹³ authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provision of this Act."¹⁴ Section 201(b) confers on the

¹³ 47 U.S.C. § 201(b).

¹⁴ *Id.*

Commission broad responsibility to adopt rules implementing the Communications Act, “which necessarily includes Title VI of the Communications Act, in general”¹⁵ and here, Section 626, in particular. As the Commission noted, other provisions of the Communications Act likewise reinforces the Commission’s general rulemaking authority, and hence its authority to adopt the rules proposed above.¹⁶ In sum, the same arguments that support the Commission’s authority to adopt the rules in the *Franchising Order* applicable to franchise grants, unambiguously supports the Commission’s authority to apply those rules in the context of franchise renewals.

¹⁵ See *Franchising Order*, ¶ 54.

¹⁶ *Id.*

CONCLUSION

The BSPA supports the Commission's tentative conclusion that the provisions of its *Franchising Order* should be applied to the renewal of franchises in competitive markets, i.e., those markets with two or more cable franchisees. The BSPA's primary concern is that changes to the franchising process that reduces one provider's costs, apply equally to all current competitive operators and potential new entrants. Applying the new franchising rules in the context of renewals of existing competitive franchises is a reasonable way to ensure that over time, all competitors in a market will be subject to the same requirements, and no provider will be competitively disadvantaged by the application of those rules.

Respectfully submitted,

BROADBAND SERVICE PROVIDERS ASSOCIATION

By: /s/

John D. Goodman
Executive Director
Broadband Service Providers Association
1735 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
(202) 661-3945

William P. Heaston
Regional Director, Government Affairs
PrairieWave Communications, Inc.
5100 So. Broadband Lane
Sioux Falls, SD 57108
(605) 965-9894

*Regulatory Committee Chairman,
Broadband Service Providers
Association*

Dated: April 20, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 2007, a copy of the foregoing Comments of The Broadband Service Providers Association were served via electronic mail on each of the persons listed on the attached service list.

/s/

John D. Goodman

SERVICE LIST

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Deborah Taylor Tate
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Michelle Carey
Office of the Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Rick Chessen
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Rudy Brioché
Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Chris Robbins
Office of Commissioner Deborah Taylor Tate
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Cristina Chou Pauze
Office of Commissioner Robert M. McDowell
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Monica Desai, Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Rosemary C. Harold, Deputy Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Mary Beth Murphy
Policy Division, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Steven Broekaert
Policy Division, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Karen Kosar
Policy Division, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Qualex International
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554